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Supreme Court, U.S.
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No. 99-1823

IN THE
Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission can override an individual employee's contract to arbitrate all employment-related claims by bringing an action in court to recover monetary damages and equitable relief specifically for the individual employee?

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STATEMENT OF THE CASE

Respondent Waffle House, Inc. ("Waffle House") employed Eric Scott Baker as a grill operator. At the time of his hire and as part of the application process, Baker agreed to arbitrate all employment disputes he may have against Waffle House. Waffle House terminated Baker's employment in September 1994.

Baker filed an administrative charge with Petitioner, the Equal Employment Opportunity Commission ("EEOC"). He alleged in the charge that Waffle House discriminated against him based on an alleged disability, in violation of the Americans With Disabilities Act of 1990, 42 U. S. C. § 12101, *et seq.* (2000) ("ADA"). EEOC found reasonable cause to believe Waffle House discharged Mr. Baker in violation of the ADA. EEOC neither investigated whether, nor concluded, there was reasonable cause to believe that Waffle House may have discriminated against any other employee.

After EEOC and Waffle House were unable to successfully conciliate Baker's charge, on September 6, 1996, EEOC filed a complaint against Waffle House in the United States District Court for the District of South Carolina (J.A. at 36-41). EEOC alleged in the complaint that Waffle House discriminated against Baker based on an alleged disability in violation of the ADA. EEOC sued not only for injunctive relief, but also for a panoply of remedies on behalf of Baker, including reinstatement, back-pay, as well as compensatory and punitive damages.[1]

The United States Court of Appeals for the Fourth Circuit held Baker's arbitration agreement barred EEOC's

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[1] Section 12117(a) of the ADA expressly incorporates the "powers, remedies and procedures set forth in" Title VII of the Civil Rights Act of 1964. Therefore, references in this brief to Title VII's enforcement procedures apply to the ADA as well.

pursuit of individual-specific relief on his behalf in the district court. The court of appeals found EEOC is free to proceed with its district court claim against Waffle House for broad injunctive relief to vindicate its role of preventing discrimination. However, the court went on to hold Baker must pursue *in arbitration* the individual remedies EEOC sought in court, to satisfy the requirements of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (2000) ("FAA"), and the strong federal policy favoring arbitration expressed therein.

A. FACTUAL BACKGROUND

On June 23, 1994, Baker applied for work at a Waffle House restaurant located in Columbia, South Carolina. He filled out and signed a Waffle House employment application that contained a mandatory arbitration provision on the first page:

> The parties agree that *any dispute* or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

(J.A. at 59 (emphasis added)).

As part of the hiring process, Baker met with a series of Waffle House managers, starting with Waffle House's District

Manager, Lee Motlow. Motlow offered Baker a job at the Columbia restaurant, but Baker declined. Motlow referred Baker to Mike Bradley, the manager of a different Waffle House restaurant in West Columbia, South Carolina. Bradley and Baker met at the West Columbia restaurant and agreed on a date for Baker to start work (J.A. at 43).[2]

On August 10, 1994, Baker began working for Waffle House as a grill operator (*Id.*). Apparently due to a change in his medication, Baker suffered a seizure at work on August 26, 1994 (J.A. at 44). Waffle House discharged Baker on or about September 5, 1994 (J.A. at 44-45).

Baker did not initiate arbitration proceedings pursuant to his agreement, and has never argued that the arbitration agreement either is invalid or does not apply to his discrimination claim under the ADA.

B. PROCEDURAL HISTORY

Baker filed a timely charge of discrimination with EEOC, alleging that his discharge violated the ADA. Under a work-sharing agreement, EEOC deferred Baker's charge to the South Carolina Human Affairs Commission ("SCHAC") for investigation.

SCHAC concluded there did not appear to be reasonable cause to find that Baker's discharge was discriminatory. SCHAC transmitted to EEOC its disposition of the charge for review. EEOC then conducted its own investigation of Baker's claim and, contrary to SCHAC's determination, concluded there was "reasonable cause" to believe that Baker's discharge violated the ADA. After an unsuccessful

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[2] This description is taken from the detailed factual recitation EEOC offered in its standard interrogatory responses made pursuant to S.C. Dist. Ct. Local Rule 26.03 (J.A. at 43). These mandatory interrogatory responses "may be relied upon and used in the same manner as discovery responses obtained under the Federal Rules of Civil Procedure." *Id.* Rule 26.02.

attempt at conciliation, EEOC issued a Notice of Conciliation Failure.

On September 9, 1996, EEOC filed its complaint against Waffle House in the United States District Court for the District of South Carolina. EEOC alleges Waffle House violated the ADA by terminating Baker's employment because of an alleged disability (J.A. at 36).

EEOC states in the complaint it seeks individual-specific remedies on behalf of Baker, including reinstatement, back-pay, compensatory and punitive damages (J.A. at 38-40). The complaint, however, is wholly devoid of any allegations regarding the existence of any similarly situated individuals, or the existence of some unlawful policy or practice. EEOC in its prayer for relief does not request equitable relief on behalf of anyone except Baker (J.A. at 39-40).

In response to the complaint, Waffle House filed a petition to compel arbitration and to stay proceedings pursuant to the FAA (J.A. at 2, 10). Waffle House also filed a motion to dismiss the action under Fed. R. Civ. P. 12(b)(6), maintaining that all claims asserted in the litigation must be arbitrated under Baker's agreement to arbitrate contained in the employment application (*Id.*).

The magistrate judge to whom the case was referred issued a Report and Recommendation, concluding that Waffle House's petition to compel arbitration should be granted, and EEOC's action should be stayed pending arbitration (Pet. App. at 37a). EEOC then filed objections to the magistrate judge's Report and Recommendation (J.A. at 3).

On March 24, 1998, the district court entered an order rejecting the magistrate judge's Report and Recommendation (Pet. App. 30a). The district court held that the terms and conditions of Baker's employment with Waffle House did not include the arbitration agreement contained in the employment application. The district court found significant that Baker had submitted his employment application at one Waffle House restaurant, but later was hired to work at a

different Waffle House. Accordingly, the district court concluded no arbitration agreement existed between Waffle House and Baker, and it refused to compel arbitration, stay the litigation, or dismiss the complaint (Pet. App. 33a-34a).

On March 31, 1998, Waffle House timely appealed the district court's order to the United States Court of Appeals for the Fourth Circuit (J.A. at 4). The court of appeals heard oral argument on March 1, 1999, and issued its opinion on October 6, 1999 (J.A. at 5), affirming in part and reversing in part the district court's decision (J.A. at 7). EEOC petitioned for rehearing and rehearing *en banc* (J.A. at 6). The court of appeals denied that petition on January 14, 2000, and issued its mandate on January 24, 2000 (Pet. App. at 35a; J.A. at 6).

EEOC then petitioned this Court for a Writ of Certiorari on May 15, 2000. EEOC limited its request for review to the court of appeals's limitation on EEOC's ability to seek "make-whole" relief in a judicial forum on behalf of Baker. This Court granted EEOC's petition on March 26, 2001.

C. THE OPINION BELOW

The court of appeals first concluded Baker's employment application, which contained the arbitration agreement, was an enforceable contract. The court held the arbitration agreement, contained in the employment application Baker signed, bound him without regard to the specific Waffle House restaurant in which he ultimately began working (J.A. at 11-13).[3]

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[3] EEOC concedes for purposes of this Court's review that Baker's arbitration agreement with Waffle House is valid and enforceable under the FAA (*see* Pet. for Cert. at 10 n.2; Pet. Brf. at 10). While the validity of the agreement is not open to serious dispute, *see Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001), Waffle House agrees with EEOC that the issue of the enforceability *vel non* of the arbitration agreement is not before this Court.

The court of appeals then considered whether EEOC should be allowed to do what Baker could not: sue Waffle House in court for damages payable to Baker, as well as other individual-specific relief. In brief, the court of appeals ruled EEOC could not seek individual-specific remedies on behalf of Baker, because he agreed such remedies were available to him only through arbitration. The court of appeals held EEOC could maintain its action against Waffle House, but only for broad-based injunctive relief (J.A. at 13-24).

In reaching its decision, the court of appeals acknowledged EEOC's important role in protecting the public from employment discrimination (J.A. at 13-14). The court also recognized, however, that in light of Baker's arbitration obligation, EEOC's effort to vindicate Baker's individual interests in court conflicted with the FAA and the strong federal policy favoring arbitration (J.A. at 20).

To resolve the possible tension between co-existing statutes (here, the FAA and ADA), the court of appeals applied traditional principles of statutory interpretation. In doing so, the court struck a balance between the respective federal statutes endorsing EEOC's public interest role and Baker's enforceable agreement to arbitrate:

> When an individual and an employer agree to submit employment disputes to arbitration, it is the federal policy to give that contract effect in order to favor the arbitration mechanism for dispute resolution. To permit EEOC to prosecute in court Baker's individual claim–the resolution of which he had earlier committed by contract to the arbitral forum–would significantly trample this strong policy favoring arbitration. Because Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done for himself. The EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts but, as we conclude herein, it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims. Although the EEOC acts in the public interest, even when enforcing only the charging party's claim, the public interest aspect of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief to attack discrimination more generally.

(J.A. at 20-21). Having identified the policies underlying both the ADA and Title VII, 42 U.S.C. § 2000e, *et seq.* (2000), the court harmonized the EEOC's enforcement role thereunder with the FAA:

> *When the EEOC seeks make-whole relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court* because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.

(*Id.* at 20-21 (emphasis added)).

Accordingly, the court of appeals affirmed the district court's order denying Waffle House's petition to compel arbitration and refused to compel EEOC to arbitrate Baker's claim. The court, however, reversed the district court's order denying Waffle House's motion to dismiss EEOC's claims for individual-specific relief on behalf of Baker. (J.A. at 23-24).

SUMMARY OF ARGUMENT

A. A fundamental, threshold issue is uncontested in this Court: Baker and Waffle House entered into a valid and enforceable arbitration agreement under the FAA, which encompasses the ADA claim at issue in this case (*See supra* n.3; Pet. Br. 10, 24).

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute thus embodies a liberal federal policy favoring arbitration repeatedly recognized in this Court's precedents. This Court further has held, as recently as last Term, that civil rights claims properly may be resolved by resort to arbitration without undermining enforcement of the civil rights laws. *See Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001) (holding that failure to adopt clear rules providing for enforcement of arbitration agreements would result in "breeding litigation from a statute that seeks to avoid it" (citation omitted)).

B. The Fourth Circuit correctly harmonized the text of the FAA and the federal policy favoring arbitration with Title VII and the ADA, and the EEOC's enforcement role under those statutes.

Because EEOC seeks to circumvent an arbitrable claim by seeking individual-specific relief, the burden is on the agency to demonstrate that another statute trumps the clear meaning of the FAA. Nothing in either the ADA or Title VII states, directly or indirectly, that EEOC can proceed in this fashion.

Instead, either of two textual readings is superior to that proffered by EEOC. Both support the judgment below. First, Title VII authorizes EEOC to secure only "appropriate" relief. 42 U.S.C. § 2000e-5(g)(1). When an employee has validly agreed to pursue his claim through arbitration, it cannot fairly be said to be "appropriate" to let a third-party recover on his behalf and *on the identical claim*. Second, because neither

Title VII nor the ADA speak directly to this circumstance, those statutes and the FAA should be read *in pari materia* to favor arbitration. This Court has confronted even more direct conflicts between remedial legislation and the FAA on several occasions, repeatedly adopting a construction that favors arbitration. The same result is appropriate here because Title VII and the ADA expressly encourage the use of alternative dispute resolution mechanisms, including arbitration. The EEOC's contrary view–which rests substantially on its reading of the 1972 amendments to Title VII–is incorrect: the amendments, and decisions interpreting them, make clear that the EEOC is not the exclusive advocate of the public interest.

Permitting EEOC to secure individual-specific relief, including money damages, on an arbitrable claim would contravene the purposes of the FAA–particularly, Congress' goal to foster arbitration. If EEOC's view is accepted, an employer can never have confidence *ex ante* that its agreement with employees to arbitrate will have force, for EEOC can always file an action alleging the same claims to secure individual-specific relief for the same employees.

Moreover, employers would be faced with identical proceedings in multiple fora. The inevitable delays and increased expenses attendant to this circumstance would subvert the FAA's and Title VII's salutary policies in favor of expeditious relief. Further, the obvious danger that a court and arbitrator will review identical facts but reach inconsistent results will derogate not only the FAA and anti-discrimination statutes, but also bedrock principles of finality and consistency essential to the orderly resolution of civil disputes.

In short, EEOC's position, if adopted, would undermine the arbitration programs the nation's employers have instituted, to the ultimate detriment of both employers and employees. Such a result is not acceptable under the FAA or Title VII for that matter.

EEOC's complaint seeks, among other things, reinstatement of Baker, back pay, compensatory damages, and punitive damages. Any recovery on that claim by EEOC would go directly to Baker. Baker, however, agreed to arbitrate these claims.

EEOC thus seeks to do what Baker could not: proceed directly in federal court to recover for Baker precisely the same remedies that Baker agreed to pursue only through arbitration. Yet, EEOC in seeking relief exclusively on behalf of Baker acts as his representative and, therefore, takes Baker as it finds him. A plaintiff standing in Baker's shoes (such as EEOC) cannot proceed directly in federal court on a claim where the agency seeks to recover for Baker precisely the monetary and other individual-specific remedies that Baker has agreed to pursue only through arbitration. Although an unrelated third-party generally is not bound by an arbitration agreement to which it did not agree when it is seeking relief on behalf of itself, this is a very different circumstance. The federal courts consistently refuse to allow circumvention of arbitration agreements through litigation that, while nominally brought by a third party, is in reality for the benefit of the party who has agreed to arbitrate.

EEOC's enforcement role therefore must be reconciled with the text of the FAA as well as the strong federal policy favoring arbitration. The court of appeals did just that. The court correctly decided EEOC is precluded by the FAA insofar as the agency seeks individual-specific relief on behalf of Baker on a claim that he agreed to arbitrate. EEOC remains free to pursue other claims such as for injunctive relief against discrimination in the workplace. As the Court stated in *Gilmer v. Interstate/Johnson Lane Corporation*, "arbitration agreements will not preclude the EEOC from bringing actions seeking classwide and equitable relief." 500 U.S. 20, 32 (1991).

EEOC's statutory right to litigate claims on behalf of individual employees cannot bear the weight the agency places upon it. Even EEOC admits its absolutist

interpretation is erroneous. For example, EEOC may not continue to seek individual monetary remedies if the employer and employee settle their claims. In fact, individuals' unilateral action may limit the range of damages EEOC may seek on their behalf in a number of circumstances: courts impose such limitations when individuals fail to mitigate damages, when an employer discovers "after-acquired" evidence of misconduct, or when individuals refuse to waive the psychotherapist-patient privilege. EEOC does not, and could not, claim exemption from the courts' imposition of these restrictions.

EEOC's position neither is compelled nor even substantially supported by *General Telephone Company v. EEOC*, 446 U.S. 318 (1980). Not only was *General Telephone* decided before a significant portion of this Court's FAA jurisprudence and the Civil Rights Act of 1991, but it also does not speak to any of the issues now before the Court. The fact *General Telephone* states, in the context of class actions under Fed. R. Civ. P. 23, that EEOC does not act "merely" as a surrogate for individual claimants, 446 U.S. at 326, does not relate to the issues in this case. There is no serious dispute at all that, as to the individual-specific remedies (including damages) at issue here, EEOC is seeking to recover in court solely on behalf of Baker on a claim that Baker himself agreed to arbitrate.

EEOC's policy arguments are no more persuasive. Its claim that actions of this sort are essential to its mission of pursuing civil rights violations is contradicted by the empirical record: EEOC participates in less than two percent of all employment-discrimination litigation. Also, it is unlikely that Congress intended to strip the individual of control over his own claim in the manner proposed by EEOC, which maintains that the employee will not be permitted to participate in any respect in its lawsuit.

EEOC's discussion of the remedies available under Title VII and the ADA does not undermine the Fourth Circuit's judgment. Monetary remedies are indeed important, but the

relevant point is that they are available to the employee in arbitration. This Court has recognized that such individual actions are an important means of furthering the civil rights laws, including through arbitration. EEOC itself has the unquestioned authority to secure equitable relief including injunctions, as well as monetary sanctions if the employer fails to comply. Indeed, the better reading of Title VII is that EEOC may intervene in the arbitration. In any event, if contrary to the plain statutory meaning, Congress intended to permit EEOC to pursue individual-specific remedies in these circumstances, it is free to amend the statutory language accordingly.

C. At bottom, EEOC simply seeks to pursue here its long-standing, deeply felt policy against arbitration of employment disputes. Congress, however, has made a contrary choice. Disputes about the wisdom of that choice are not to be resolved in this forum.

ARGUMENT

A. THE PLAIN TEXT OF THE FEDERAL ARBITRATION ACT AND THE CLEAR CONGRESSIONAL POLICY FAVORING ARBITRATION COMPELLED THE FOURTH CIRCUIT'S DECISION

Congress enacted the FAA in 1925 to reverse a longstanding judicial hostility towards arbitration that American courts inherited from the English common law. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991. The purpose for its passage was to ensure judicial enforcement of privately made agreements to arbitrate. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). The FAA accordingly provides that written agreements to arbitrate covered by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see Dean Witter Reynolds, Inc.*, 470 U.S. at 218.

1. The Federal Arbitration Act Evinces a Strong Federal Policy in Favor of Arbitration

This Court has recognized that the FAA manifests a "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25 (internal quotation omitted). The FAA's command leaves no room for the exercise of discretion by a court. Indeed, it mandates enforcement of a valid agreement to arbitrate that is subject to the FAA. *See Dean Witter Reynolds*, 470 U.S. at 218. [4]

Last Term, in *Circuit City Stores, Inc. v. Adams*, this Court resolved any doubt about its endorsement of arbitration in the context of employment disputes:

> [T]here are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. . . . The considerable complexity and uncertainty that the construction of § 1 urged by respondent would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's

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[4] Thus, when ruling on a petition to compel arbitration under Section 4 of the FAA, a court may consider only two questions: (1) whether the parties have executed an arbitration clause covering the dispute in issue; and (2) whether one party has refused to abide by the arbitration clause. If both questions are answered in the affirmative, the court must grant the petition. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

> proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.' *The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law*; as we noted in Gilmer, 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'

121 S. Ct. 1302, 1313 (2001) (emphasis added) (internal citations omitted).

There is no dispute Baker and Waffle House entered into an agreement to arbitrate that is enforceable under the FAA. *See supra* n.3. The parties likewise agree Baker has no judicial remedy available to him regarding his discrimination claim (*See* Pet. Brf. at 25). The FAA requires enforcement of such agreements.

But EEOC asserts it may do what Baker cannot: proceed in court for damages payable to Baker, without regard to Baker's success *vel non* in arbitration. This position creates tension between the FAA and the anti-discrimination statutes. The respect that the court of appeals afforded to Baker's arbitration agreement and the anti-discrimination statutes is fully in accord with this Court's precedents.

2. This Court Repeatedly Has Upheld the FAA's Strong Policy Favoring Arbitration of Claims Under Federal Employment Discrimination Statutes and Other Remedial Federal Laws

It is far too late in the day for EEOC to insist individuals may not effectively vindicate their rights in arbitration, or that arbitration somehow undermines the agency's power to enforce the civil rights laws. On numerous occasions, the Court has been asked to exempt a variety of federal statutory

claims from the FAA's pro-arbitration policy. In each case before it, the Court has examined the relevant statutory text and the Congressional policy underlying the statute, balanced the text and policy against the strong federal interest in enforcing arbitration agreements, and required arbitration. *See, e.g., Gilmer*, 500 U.S. 20 (1991). The Court repeatedly has found that claims under statutes furthering broad remedial goals–even under those that confer "private attorney general" obligations on individuals–are appropriate for submission to mandatory arbitration. In fact, to Waffle House's knowledge, there is no federal statute the Court has found *per se* inappropriate for arbitration.

Gilmer is a compelling example of the Court's jurisprudence in this area. The Court for the first time addressed mandatory arbitration of federal discrimination claims outside of the collective bargaining context. The Court reconciled the FAA with the Age Discrimination in Employment Act, 29 U.S.C. §. 621, *et seq.* (2000) ("ADEA"), a statute EEOC also enforces. *Id.* § 626(1). The Court first noted it was Gilmer's burden to show that Congress intended to prohibit a waiver of a judicial forum for his ADEA claim. Any such intention would "be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes." *Gilmer*, 500 U.S. at 26. The Court was careful to note, however, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.*

The Court held Gilmer was required to arbitrate his ADEA claim, as Gilmer failed to demonstrate a contrary Congressional intent. *See id.* at 35. The Court also found an employee's agreement to resolve ADEA claims in arbitration would fulfill both the individual and the critical societal functions of the ADEA. *See id.* at 27-28 ("We do not perceive any inherent inconsistency between [the ADEA's] policies, however, and enforcing agreements to arbitrate age discrimination claims.").

The Court also endorsed private arbitration of antitrust claims in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Although the Court recognized the significant public interest aspects of the Sherman Antitrust Act, it recognized the private plaintiff is akin to a private attorney general, assigned a central role in enforcing the antitrust laws. *Id.* at 635.

After deciding *Mitsubishi*, the Court embraced mandatory arbitration of claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act, *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987); the Securities Act of 1933, *Rodriguez De Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989); and, as noted above, the Age Discrimination in Employment Act, *Gilmer*, 500 U.S. 20.

B. THE COURT OF APPEALS CORRECTLY HARMONIZED THE TEXT AND POLICIES OF THE FEDERAL ARBITRATION ACT, TITLE VII, AND THE ADA

The court of appeals struck an appropriate balance between EEOC's public interest mission and the federal policy favoring arbitration. The court's resolution is consistent with this Court's jurisprudence involving the interpretation of co-existing statutes, including the FAA, so as to give effect to Congressional intent. The decision of the court below also fully protects EEOC's legitimate interest in protecting the public interest in a discrimination-free workplace. At the same time, the decision furthers the strong national interest in the enforcement of arbitration agreements.

1. The Court of Appeals Properly Applied Traditional Principles of Statutory Construction Consistent With *Gilmer* and Other Cases

This Court often has stated courts are "not at liberty to pick and choose among congressional enactments, and when

two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Pitt. & Lake Erie R.R. Co. v. Ry. Lab. Execs. Ass'n*, 491 U.S. 490, 510 (1989); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). The Court gives effect to each federal statute involved in a case, if it can do so while preserving their history and purpose. *Id.* at 550. This Court also does not read sections of a statute in isolation. Rather, the Court looks "to the provisions of the whole law, and to its object and policy." *Richards v. United States*, 369 U.S. 1, 11 (1962); *see also Circuit City*, 121 S. Ct. at 1311 ("We must, of course, construe the 'engaged in commerce' language of the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose.").

The Court applied these principles in *Gilmer*, easily harmonizing the FAA with the ADEA, and giving force to the agreement between the employer and employee to arbitrate the employee's claim. *See Gilmer*, 500 U.S. at 27-33. This Court has applied these tenets in other contexts as well, *see, e.g., Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970) (inferring exception to Norris-LaGuardia Act's absolute prohibition against enjoining labor disputes to ensure certain strikes may be enjoined under Section 301 of the Labor Management Relations Act), including cases involving the FAA, *see, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (applying FAA to arbitration under Carriage of Goods By Sea Act).[5]

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[5] The anti-injunction provision of the Norris-LaGuardia Act reads:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent

2. The FAA and Title VII Are "Capable of Co-existence" and, Therefore, Both Must Be Given Effect

Nothing in the text or policy of the FAA or Title VII (or the ADA for that matter) creates an "inherent conflict" that would preclude this Court from giving full effect to both federal statutes. *See Gilmer*, 500 U.S. at 26.[6] On the contrary, like the ADEA, Title VII readily accommodates this Court's "healthy regard" for the FAA's pro-arbitration policy.

a) EEOC, Like Any Plaintiff in an ADA or Title VII Case, Is Limited to Recovery of "Appropriate Relief," as Determined by a Court

EEOC is wrong to argue that precluding it from obtaining individual-specific remedies is contrary to Title VII's enforcement provisions. The agency contends Title VII "embodies a congressional policy that there can be a strong public interest in obtaining each of the forms of relief authorized by statute and *a congressional delegation to the EEOC–not the courts*–of the authority to decide when the public interest warrants bringing a public enforcement action to obtain that relief" (Pet. Brf. at 27 (emphasis added)). EEOC also argues that "Congress gave [it] complete control over the relief that it is entitled to seek . . ." (Pet. Brf. at 18; *see also id.* at 17) (explaining that Title VII "grants the EEOC the right to obtain *all* statutory remedies in any action that it brings") (emphasis added).

Nothing in the text of Title VII (or the ADA) supports EEOC's argument. On the contrary, the text of Title VII

> injunction in any case involving or growing out of any labor dispute....

29 U.S.C. § 104 (2000).

[6] The ADA incorporates Title VII's enforcement provisions. *See supra* n.1.

supports the Fourth Circuit's decision. Like the ADEA, Title VII provides for concurrent jurisdiction in federal and state court. *See Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 825 (1990) (holding Title VII provides for concurrent jurisdiction).[7] A statute's authorization of concurrent jurisdiction is consistent with permitting arbitration. *See Gilmer*, 500 U.S. at 29.

Moreover, Title VII specifically authorizes the *courts*, not EEOC, to determine the "appropriate" relief, if any, to which the agency may be entitled in a lawsuit.[8] The Civil Rights Act of 1991, which expanded available remedies under the ADA and Title VII, is completely silent as to EEOC's power. *See* 42 U.S.C. § 1981a(b)(1) (2000) (stating that complaining parties "may recover" compensatory and punitive damages).

In sum, EEOC can point to nothing in the text of Title VII or the ADA that conflicts with the FAA. These statutes may, and do, co-exist peacefully.

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[7] *See* 42 U.S.C. § 2000e-5(f)(3) ("Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.").

[8] Section 706(g)(1) of Title VII provides, if there is a finding of discrimination:

> the *court* may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action *as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief *as the court deems appropriate*.

42 U.S.C. § 2000e-5(g)(1) (emphasis added).

b) This Court in *Gilmer* Interpreted the FAA and an Anti-Discrimination Statute to Ameliorate Potential Conflicts Between Them

Like Title VII and the ADA, the ADEA is intended to eliminate discrimination in the workplace and, therefore, serves important societal functions. *See McKennon v. Nashville Banner Publg. Co.*, 513 U.S. 352, 358 (1995). Several of the ADEA's enforcement provisions suggest Congress provided for relief only in court; indeed, none expressly authorize arbitration.[9] Yet, the Court stated in *Gilmer*, Congress "did not explicitly preclude arbitration or other nonjudicial resolution of claims even in the recent amendments to the ADEA. If Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from the text or legislative history." *Id.*, 500 U.S. at 29. The Court found no such Congressional intent, *id.* at 35, upheld the FAA's policy, and required Gilmer to arbitrate his ADEA claim.[10]

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[9] *See* 29 U.S.C. § 626(b) ("In any action brought to enforce this Act the *court* shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act . . . .") (emphasis added); *id.* at § 626(c)(1) ("Any person aggrieved may bring a civil action *in any court of competent jurisdiction* for such legal or equitable relief as will effectuate the purposes of this Act . . . .") (emphasis added); *id.* at § 626(c)(2) ("In an action brought under paragraph (1), *a person shall be entitled to a trial by jury* of any issue of fact in any such action . . . .") (emphasis added).

[10] Similarly, this Court in *McMahon* ordered arbitration of claims brought under both the Securities Exchange Act of 1934 and RICO, even though both statutes are silent about arbitration and appear to authorize jurisdiction in "court" alone. *See* 15 U.S.C. § 78aa (2000) ("The district courts of the United States . . . shall have exclusive jurisdiction of violations of this title . . . and of any and all suits in equity and actions at law . . . ."); 18 U.S.C. § 1964(c) (2000) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . .").

c) The FAA Is Consistent With the ADA as Well as Title VII and the 1972 and 1991 Amendments Thereto

EEOC heavily relies on the 1972 amendments to Title VII as proof that the court of appeals erred in its decision below. EEOC's interpretation of the 1972 amendments is wrong. Moreover, the ADA and the 1991 amendments to Title VII support the decision of the court below.

(1) *The ADA and the 1991 Amendments to Title VII Encourage Arbitration*

The ADA expressly encourages the use of arbitration, rather than litigation, to resolve claims under the statute: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, *is encouraged to resolve disputes arising under this Act.*" 42 U.S.C. § 12212 (emphasis added). This express Congressional declaration can only be interpreted as encouraging the resolution of ADA claims through arbitration or a means other than court litigation (regardless of whether EEOC or an individual is the plaintiff). *See, e.g., Bercovitch v. Baldwin School*, 133 F.3d 141, 150 (1st Cir. 1998) ("The meaning of [42 U.S.C. § 12212], far from evidencing an intention to preclude arbitration, can only be interpreted as favoring it.").

Congress enacted the ADA in 1990. A year later, Congress passed the Civil Rights Act of 1991, in which it amended Title VII, *inter alia*, to contain a similar endorsement of arbitration: "where appropriate and to the extent authorized by law, the use of arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Title." *See* Pub. L. No. 102-166, § 118, 105 Stat. 1081 (1991). This provision, too, can only be construed as favoring increased arbitration of Title VII claims. *See, e.g., Desiderio v. NASD*, 191 F.3d 198, 204-05 (2d Cir. 1999) ("We conclude–as did the Third, Fourth and

Seventh Circuits–that the text of § 118 evinces a plain Congressional purpose of encouraging arbitration of Title VII claims and not one of precluding such arbitration."), *cert. denied*, 121 S.Ct. 756 (2001).

(2) *EEOC Misapprehends the Import of the 1972 Amendments to Title VII, Which Do Not Undermine the Fourth Circuit's Decision*

EEOC argues the 1972 amendments to Title VII establish its enforcement role in court as "paramount," and cannot be limited by the persons on whose behalf it sues (Pet. Brf. at 11, 28-30). The 1972 amendments in no way elevate EEOC to a higher plain than private litigants.

To be sure, Congress in 1972 was motivated to amend Title VII because it was dissatisfied with the progress of Title VII enforcement since the passage of the Civil Rights Act of 1964. It also is true that Congress authorized EEOC to bring actions in its own name to enhance enforcement of Title VII. But there is no merit whatsoever to EEOC's suggestion that Congress intended this new enforcement authority (1) to supplant the critical role of private litigation or (2) to change Title VII's core principle: that, wherever possible, discrimination charges are to be resolved *without* resort to litigation in court.

The 1972 amendments did not make EEOC the exclusive guardian of the public interest in enforcement of the civil rights laws. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 46 (1974) (holding that even after 1972 amendments, "the private right of action remains an *essential means* of obtaining judicial enforcement of Title VII" (emphasis added)). The critical importance of the individual enforcement action was confirmed in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977). There, the Court considered whether the 180-day period set forth in Section 706(f)(1) of Title VII operated as a statute of limitations applicable to EEOC enforcement actions. Analyzing the legislative history of the 1972

amendments at length, the Court observed that preservation of the private right of action under Title VII was of utmost importance, notwithstanding EEOC's new enforcement authority. The Court noted the Senate Committee's view that the primary concern of the 1972 amendments was to protect the aggrieved person's option to seek a prompt remedy, and the purpose of the 180-day provision was to preserve the private right of action by an aggrieved person. *Id.* at 364 (citing Sen. J., 92nd Cong., 1st Sess., § 4(a) (1971); Sen. J., 92nd Cong., 1st Sess., § 3(c) (1971)).

The Court in *Occidental Life* also quoted from the Conference Report issued after final passage of the amendments. The Report clearly establishes that the intent of Section 706(f)(1), the section establishing EEOC's enforcement authority, was to retain private enforcement of Title VII:

> The retention of the private right of action, as amended, . . . is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed. Accordingly, the provisions . . . allow the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution. It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC . . . However, as *the individual's rights to redress are paramount* under the provisions of Title VII it is necessary that all avenues be left open for *quick and effective relief*.

Id. at 365-66 (emphasis added).[11] *See also Nashville Banner*, 513 U.S. at 358 (holding that private litigants "vindicate[] both the deterrence and the compensation objectives" of the anti-discrimination statutes); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("Congress considered the charging party a private attorney general, whose role in enforcing the ban on discrimination is parallel to that of the Commission itself.").

In short, Congress left no doubt that its "paramount" concern was for individuals to obtain quick and effective relief from discrimination. There was no mention of placing EEOC's public enforcement role ahead of individual relief, or of any critical EEOC role in the development of precedent. The 1972 amendments, however, do express a clear concern that there be no impediment to the individual's expeditious recovery.

3. The Court of Appeals Correctly Gave Effect Both to the FAA and Title VII by Precluding EEOC From Seeking Individual-Specific Remedies on Behalf of Baker While Permitting It to Seek Broad Injunctive Relief in Court

The decision of the court of appeals authorizes complete relief under Title VII. EEOC may litigate in court to obtain a judicial declaration that an employer is violating the law. The agency also may obtain an injunction to correct unlawful practices and prohibit future violations (*see* J.A. at 21-22); *see also Gilmer*, 500 U.S. at 32 ("It should be remembered that arbitration agreements will not preclude EEOC from bringing

[11] The reference in this quote to "offices of the EEOC" apparently referred to the agency's administrative conciliation efforts, not EEOC enforcement actions. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 78 (1984) ("Congress did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation.").

actions seeking classwide and equitable relief.").[12] The decision also allows Baker to pursue in arbitration all individual remedies available to him, which not only will vindicate his personal interest but also any public interest intended by Congress for such relief. *See Gilmer*, 500 U.S at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").[13]

Because complete relief is available, EEOC cannot successfully draw a parallel between the instant case and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), or *Alden v. Maine*, 527 U.S. 706 (1999). These decisions in no way conflict with the judgment of the court below. The Court is not called upon in the instant case to decide whether the FAA must yield to EEOC where, as in *Alden* and *Garrett*, the individual is without *any* remedy.[14]

[12] Contrary to EEOC's argument (Pet. Brf. at 22 n.7), EEOC also is free to seek intervention in arbitration. EEOC's contention the Fourth Circuit's decision is contrary to Title VII because the statute authorizes EEOC to appear only "in court" (*see id.* n. 8), is wrong. Nothing in Title VII or the ADA vests exclusive jurisdiction in the federal courts, or precludes EEOC from appearing in an arbitration proceeding. *See supra* nn.9, 10 and accompanying text.

[13] EEOC's argument that the Fourth Circuit's decision should be reversed because it will result in dual proceedings should be rejected (Pet. Brf. at 39-40). This result may be required to give effect to the FAA. *See, e.g., Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20 (1983) ("[T]he relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement."). Indeed, it is *EEOC* that advocates independent, identical proceedings in court and arbitration, which belies its alleged concern. *See* discussion *infra* n.17 and accompanying text. In any event, given that EEOC litigates only a handful of cases per year, *see infra* nn.19, 20 and accompanying text, very few cases as a practical matter will involve an employee subject to arbitration *and* be an appropriate case for injunctive relief.

[14] In holding the Eleventh Amendment barred individuals' actions under the ADA against state governments, the Court recognized the

Here, as stated, Baker would be free to pursue in arbitration any remedies available to him.[15]

a) EEOC Effectively May Fulfill Its Public Interest Role by Seeking Injunctive Relief

EEOC attempts to minimize the importance of injunctive relief in discrimination cases. Indeed, it goes so far as to argue an injunction "can be a toothless sanction" (Pet. Brf. at 14). However, the courts that issue these injunctions believe otherwise. *See, e.g., Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) ("Injunctions are one of the law's most powerful weapons."): *Harmon v. Thornburgh*, 878 F.2d 484, 499 (D.C. Cir. 1989) (Silberman, concurring in part and dissenting in part) (stating an injunction is the most powerful civil order available to the judiciary).[16]

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federal government was authorized to sue states for money damages: "Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex Parte Young*, 209 U. S. 123 (1908)." *Garrett*, 121 S. Ct. at 968 n.9

[15] Indeed, it is highly unlikely this Court *ever* will be asked to balance the FAA's pro-arbitration policy against EEOC's role under the ADA, in a case where the Eleventh Amendment barred a public employee's lawsuit against a state. After all, if a state agreed to arbitration with its employee, it necessarily would have *consented* to litigation in that forum. *Cf. Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) (holding that a state may consent to suit and waive Eleventh Amendment immunity). Perhaps for this reason, EEOC does not cite to a single example of a state and its employees agreeing to arbitrate discrimination claims.

[16] EEOC quotes *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), for the proposition that "if employers faced only the prospect of an injunction order, they would have little incentive to shun practices of dubious legality" (*See* Pet. Brf. at 37). That quote must be viewed in context. In *Albermarle Paper*, the Court considered the appropriateness of a district court's failure to award backpay despite finding a violation of Title VII. In other words, the claimants were left with an injunction but no award of damages. That is not the case under the decision below. As stated, EEOC's request for an injunction, if appropriate, is relief in

Violations of Title VII injunctions are punishable as civil contempt, subjecting the violator to fines and other sanctions. *See, e.g., Local 28, Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 443-44 (1986) (upholding district court's imposition of monetary and other sanctions for civil contempt of Title VII injunction). Indeed, a violation of an injunction (or consent decree) obtained by EEOC retains sufficient "teeth" to justify significant sanctions. *See, e.g.*, U.S. Equal Employment Opportunity Commission, *Judge Slaps Wal-Mart with Major Sanctions for Violating Court Order in EEOC Disability Bias Case* (visited Ju'y 1, 2001) <http://www.eeoc.gov/press/6-14-01.html> (announcing district court's award of $750,200 in fines and other affirmative relief for contempt of consent decree); *cf. Sheet Metal Workers, supra*, 478 U.S. at 443-44 (upholding civil contempt fines).

EEOC complains it might not always be able to establish entitlement to an injunction (Pet. Brf. at 35-36). Again, by statute, EEOC will be entitled to injunctive relief only in "appropriate" cases as determined by a court. That EEOC may not always be able to satisfy a court it is entitled to injunctive relief provides no basis to challenge the Fourth Circuit's decision. *See Gilmer*, 500 U.S. at 28. ("Nothing in the ADEA indicates that Congress intended that EEOC be involved in all employment disputes.").

b) The Court of Appeals's Decision Promotes the Important Policy of Quick and Efficient Relief Under the FAA and Title VII

The resolution the court below reached will expedite relief for victims of discrimination. As discussed, Congress considered speedy relief to be a significant policy behind Title VII. *See Occidental Life*, 432 U.S. at 364-65; *EEOC v. Ford Motor Co.*, 458 U.S. 219, 221 (1980). The Court in *Ford*

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addition to Baker's ability to seek the full range of individual-specific remedies available under Title VII.

Motor interpreted the remedies provision under Title VII to further this important policy:

> The extended time it frequently takes to obtain satisfaction in the courts may force a discrimination claimant to suffer through years of underemployment or unemployment before being awarded the job the claimant deserves. Court delays, of course, affect all litigants. But for the victim of job discrimination, delay is especially unfortunate. *The claimant cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit.* . . . In this case, therefore, we must determine how best *to fashion the remedies* available under Title VII to fulfill this basic need.

458 U.S. at 221 (emphasis added).

By giving effect to Baker's arbitration agreement, the court below fashioned Title VII's remedies consistent with its policy favoring expeditious relief. One of arbitration's benefits is that it will proceed *and conclude* far quicker than litigation in court. *See Mitsubishi*, 473 U.S. at 628 (discussing "simplicity, informality, and expedition of arbitration").

In contrast, EEOC's position will needlessly delay resolution of employment discrimination claims and render arbitration agreements essentially a nullity when the agency brings suit. Here, for example, EEOC filed the instant action approximately two years after Baker was discharged. Even EEOC speculates an employee's right to arbitrate would end long before its lawsuit would conclude (Pet. Brf. at 39 n.14). Thus, despite Waffle House's and Baker's agreement to arbitrate, it would take years before the parties to that agreement achieved a final disposition of their dispute.

EEOC's position also will result in identical claims proceeding in dual fora. Under EEOC's view, Baker and the agency simultaneously could pursue a claim against Waffle House for the same relief. True, EEOC suggests the courts

effectively may limit double recovery, but that is only one of the flaws in the agency's approach. EEOC says nothing about the drastic increase in the cost of litigation to Waffle House–not to mention to the employee should he or she wish to arbitrate *and* intervene in EEOC's litigation.

The agency also is silent about the possibility a court and arbitrator would reach opposite conclusions in parallel cases based on identical facts.[17] Courts do not allow parallel litigation to proceed when it would frustrate the purpose of the FAA. *See, e.g., Harvey v. Joyce*, 199 F.3d 790, 796 (5th Cir. 2000) (imposing stay on non-party's parallel litigation where permitting it to proceed would render arbitration proceeding meaningless and frustrate the policy favoring arbitration). If EEOC's position were adopted, the lack of finality and danger of inconsistent results engendered thereby would undermine the integrity of not only the FAA but also the anti-discrimination laws. *Cf. Montana v. U.S.*, 440 U.S. 147, 153-54 (1979) (explaining policy of finality and avoiding inconsistent results in civil litigation). In short, EEOC's misreading of the FAA and Title VII would "breed[] litigation from [statutes] that seek[] to avoid it." *Circuit City*, 121 S. Ct. at 1313.

c) EEOC's Public Interest Role Does Not Foreclose an Individual From Seeking More Expeditious Relief Without Agency Involvement

EEOC takes the absolutist position that an individual's action cannot affect the scope of the agency's enforcement litigation. This argument is untenable. There are recognized circumstances under which an individual's conduct limits EEOC's enforcement authority. Furthermore, EEOC's contention that its enforcement litigation is completely

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[17] Indeed, EEOC apparently considers it an open question whether an individual's prior, adverse arbitration decision bars the agency's action under *res judicata* (*See* Pet. Brf. at 38-40 & nn.13-14).

independent of the claims asserted by individuals does not withstand scrutiny.

(1) *Individual Claimants' Actions Limit EEOC's Power to Seek Remedies on Their Behalf*

EEOC is not entitled to pursue relief on behalf of an individual who has agreed to forego such relief. *See Gilmer*, 500 U.S. at 28 (holding that disputes may be settled without EEOC's involvement) (collecting cases). Courts have recognized that EEOC "stands in the shoes" of the individual complainant with respect to that complainant's right to pursue individual relief. For example, in *EEOC v. Goodyear Aerospace Corporation*, the court concluded the individual claimant's settlement "rendered her personal claims moot." 813 F.2d 1539, 1542 (9th Cir. 1987). Accordingly, the court limited EEOC to seeking "injunctive relief to protect employees as a class and to deter the employer from discrimination." *Id.* at 1543; *see also Occidental Life*, 432 U.S. at 381 (Rehnquist, J., dissenting) ("Insofar as the EEOC seeks to recover backpay for individuals, it stands in the shoes of the individuals, and represents them in a suit the individuals would otherwise be entitled to bring."); *New Orleans Steam Ship Assoc. v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982) (holding the EEOC may challenge a transaction that was the subject of a prior private action only if EEOC seeks different relief); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975) (finding that a settling employee was not entitled to recover any additional private benefit such as back pay through EEOC action); *see generally EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (agreeing there is privity between the EEOC and individuals for whom it seeks individual benefits); *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990).

Individual claimants may take unilateral actions apart from settlements that limit EEOC's potential remedies. The doctrines of "after-acquired evidence" or "unclean hands" may reduce back-pay liability, *see Nashville Banner*, 513 U.S.

at 360-63, as will an individual's unjustifiable failure to mitigate damages, *see Ford Motor*, 458 U.S. at 231-32 (holding employee's rejection of unconditional offer of employment limits back pay). And courts will deny an individual the recovery of emotional distress damages if he or she refuses to waive the psychotherapist-patient privilege. *See, e.g., Schoffstall v. U.S. Postal Serv.*, 223 F.3d 818 (8th Cir. 2000) (affirming dismissal of emotional distress claim where plaintiff refused to waive psychotherapist-patient privilege).

The employee's agreement to arbitrate is analogous to the individual's settlement of a discrimination claim, or other unilateral action the individual takes without EEOC's involvement. Just as the claimant's decision to settle a case waives the right to recover damages in court and *precludes EEOC from seeking such damages*, the employee's agreement to arbitrate also is a waiver of the right to seek damages in court. *See Gilmer*, 500 U.S. at 28 ("An individual ADEA claimant subject to an arbitration agreement . . . is not able to institute a private judicial action."). As such, the Fourth Circuit properly held EEOC is precluded from seeking damages in court where, as here, the alleged victim of discrimination agreed to arbitrate. *See Merrill Lynch, Pierce, Fenner & Smith v. Nixon*, 210 F.3d 814 (8th Cir. 2000) (holding that state fair employment agency precluded from seeking monetary remedies for discrimination where employee agreed to arbitration), *cert. denied*, 531 U.S. 958 (2000); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998) (holding EEOC precluded from seeking damages for discrimination where employee agreed to arbitration); *contra EEOC v. Frank's Nursery and Crafts*, 177 F.3d 448, 468 (6th Cir. 1998) (holding EEOC may proceed with separate action for individual relief despite employee's agreement to arbitrate discrimination claims).

Finally, EEOC cannot credibly argue it is immune from Baker's arbitration agreement merely because it was not a party thereto. First, Waffle House seeks not to bind EEOC to

arbitrate, but rather to give effect to its agreement with Baker. Second, "there are instances, and cases, where non-signatories to arbitration clauses may be equitably compelled to pursue their claims against a defendant in arbitration." *Lewis v. Haskell Co.*, 108 F. Supp. 2d 1288, 1293 (M.D. Ala. 2000) (quoting *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1534 (M.D. Ala. 1997) (collecting cases)). *See generally Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (presenting a list of common law contract and agency principles under which nonparties to arbitration clauses may be bound to arbitration). Indeed, a non-party to an arbitration agreement may be compelled to arbitrate in a variety of circumstances, *e.g.*, when the allegations against the party are based on the same facts and inseparable from claims against the non-party. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3rd Cir. 1993) (holding that a principal and agent should both be bound to an arbitration agreement entered into by one of them when charges against both are based on the same facts and are inherently inseparable). If non-parties to arbitration agreements may be held to arbitrate when their claims are intertwined, merely limiting EEOC's *remedies* in court when its claim is *identical* to the arbitrating party's is a restrained and fair resolution.

(2) *This Court's Decision in General Telephone Is Inapposite*

EEOC attaches great significance to *General Telephone Company v. EEOC*, 446 U.S. 318 (1980), where the Court decided the narrow issue of whether EEOC must satisfy the requirements of Fed. R. Civ. P. 23 when it brings a collective action. In essence, *General Telephone*'s holding is that EEOC need not satisfy the requirements of Rule 23 because it does not "*merely*" sue as a surrogate for the individuals on whose behalf it seeks relief. *Id.* at 326 ("These private-action rights suggest that the EEOC is not *merely* a proxy for victims of discrimination ....") (emphasis added).

EEOC extrapolates that statement into the proposition that, in an enforcement action, EEOC does not represent the charging parties on whose behalf it seeks relief, and it acts completely independently from individual claimants (Pet. Brf. at 17-19). Therefore, EEOC asserts, an individual cannot limit the scope of an EEOC action by entering into a private arbitration agreement (Pet. Brf. at 24-26).

General Telephone does not sustain EEOC's gloss. The Court's choice of the word "merely" is not as meaningless as EEOC's argument implies. Rather, it means the Court recognized EEOC fulfills two functions in an enforcement action: (1) a representative of the public interest, and (2) a representative of the individual victims of discrimination on whose behalf it sues. EEOC's reading of *General Telephone* is inconsistent with this Court's later decision in *Gilmer*, in which the Court expressly recognized individuals' rights to settle claims without EEOC's involvement. *See Gilmer*, 500 U.S. at 28.

Of course, *General Telephone* has nothing to do with arbitration at all, much less the interrelationship between the FAA and the statutes EEOC enforces. Moreover, *General Telephone*, decided in 1980, predates several of the Court's decisions under the FAA, including *Gilmer*, decided in 1991.[18] It also bears noting that *General Telephone* pre-dated the Civil Rights Act of 1991, wherein Congress specifically endorsed arbitration as a viable forum for resolving employment disputes. *See supra* p. 21-22. Moreover, Congress passed the Civil Rights Act of 1991 in part to enhance *private enforcement* of the statute. *See* H.R. Rpt. 102-40, part I, 75-77 (June 5, 1991) (*reprinted in* 1991 U.S.S.C.A.N. 539, 613-615). The House Committee Report "reaffirms the policy that unless discrimination victims can find lawyers to take their cases . . . the compelling public

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[18] Indeed, this Court first decided in 1986, six years after *General Telephone*, that arbitration of statutory claims could be compelled. *See Mitsubishi*, 473 U.S. at 624-26.

interest in eliminating discrimination cannot be served." *Id.* at 76-77.

In any event, the Fourth Circuit's decision does not offend *General Telephone*'s limited holding. The Court in *General Telephone* was concerned that EEOC would be *completely foreclosed* from representing classes of discrimination victims if it were required to satisfy the requirements of Fed. R. Civ. P. 23. The Fourth Circuit's decision, which preserves large-scale injunctive remedies, fully protects EEOC's ability to serve the public interest. *See supra* p. 24-27. The public interest in EEOC's recovery of damages paid to a specific individual because of an unlawful employment decision is negligible where, as here, the individual claimant may obtain fast and full relief in arbitration.

To bolster EEOC's argument that an individual's decisions cannot limit its enforcement activities, the agency asserts its attorneys do not represent the underlying charging parties in enforcement proceedings (Pet. Brf. at 21). This position is curious at best, as EEOC consistently has advocated the exact *opposite* position in other cases. Indeed, in numerous cases, EEOC has maintained, and courts have agreed, that its lawyers have an attorney-client relationship with charging parties and their communications with charging parties are privileged. *See, e.g., EEOC v. Johnson & Higgins*, 1998 U.S. Dist. LEXIS 17612 (S.D.N.Y. Nov. 6, 1998); *EEOC v. NEBCO Evans Dist., Inc.*, 1997 U.S. Dist. LEXIS 23111 (D. Neb. June 5, 1997); *EEOC v. McDonnell Douglas Corp.*, 948 F. Supp. 54 (E.D. Mo. 1996); *EEOC v. ChemTech Int'l Corp.*, 1995 U.S. Dist. LEXIS 21877 (S.D. Tex. May 18, 1995); *EEOC v. HBE Corp.*, 1994 U.S. Dist. LEXIS 9326 (E.D. Mo. May 19, 1994); *EEOC v. Georgia-Pacific*, 1975 U.S. Dist. LEXIS 15377 (D. Or. Nov. 10, 1975).

Additionally, EEOC has asserted the psychotherapist-patient privilege on behalf of the individuals it represents in court. *See EEOC v. Danka Industs., Inc.*, 990 F. Supp. 1138, 1141-42 (E.D. Mo. 1997) (EEOC filed motion for protective order regarding medical records of alleged victims of harassment).

(3) *EEOC Files Few Cases in Court, Demonstrating Its Limited Role in Litigation*

Further, EEOC is an almost non-existent player in enforcement litigation. This reality belies EEOC's argument that the public interest furthered by its litigation trumps the FAA. During the government's fiscal year 2000, alleged victims of discrimination filed 79,896 discrimination charges with EEOC. *See* U.S. Equal Employment Opportunity Comm'n, *Charge Statistics, FY 1992 through FY 2000* (visited July 1, 2001) <http://www.eeoc.gov/stats/charges.html>. EEOC found "reasonable cause" to believe unlawful discrimination had occurred in 8,248 of those charges. *Id.* EEOC, however, filed just *291* lawsuits during the government's fiscal year 2000, and it intervened in just 109 more.[19] In contrast, *22,412* private lawsuits alleging employment discrimination were filed in federal court in 1999 (Pet. Brf. at 26 n.9). Therefore, EEOC is responsible for bringing fewer than 2% of all anti-discrimination cases filed in federal court. Strikingly, EEOC filed suit in just 3.5% of the cases in which it found "reasonable cause." EEOC's meager litigation docket is consistent with its core function: resolution of discrimination claims via administrative conciliation and *without* litigation. *Cf. Shell Oil*, 466 U.S. at 77-78.

In sum, the FAA and Title VII (and the ADA) co-exist. The Fourth Circuit properly gave effect to each of these statutes, by limiting available relief to EEOC in court, while ensuring EEOC may enforce Title VII and the ADA through injunctive relief. The decision below should be affirmed because of the reasoned and balanced approach the court of

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[19] *See* U.S. Equal Employment Opportunity Comm'n, *EEOC Litigation Statistics, FY 1992 through FY 2000* (visited July 1, 2001) <http://www.eeoc.gov/stats/litigation.html>.

appeals took in accommodating the important federal policies embodied in these statutes.

C. EEOC'S ARGUMENTS ARE PREMISED ON AN OBSOLETE HOSTILITY TOWARD, AND MISTRUST OF, ARBITRATION

Despite this Court's repeated, strong endorsement of arbitration as a desirable and acceptable method of resolving disputes, EEOC continues to resist arbitration of employment discrimination claims. EEOC maintains a formal "policy" against mandatory arbitration of disputes falling within its purview. *See* U.S. Equal Employment Opportunity Commission, *Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (visited July 1, 2001) <http://www.eeoc.gov/docs/mandarb.html> (the "Policy"). In its Policy, issued six years after this Court decided *Gilmer*, EEOC wrongly states mandatory arbitration programs "undermine the purposes of the laws enforced by the EEOC." *Id.* [20]

EEOC gives vitality to its Policy by continuing to argue in court that mandatory arbitration agreements are unlawful. *See, e.g., Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 834 (D.C. Cir. 2001) ("The EEOC has been waging a losing battle in its efforts to convince the courts that agreements like Borg-Warner's cannot be enforced to require employees to arbitrate Title VII claims."); *Frank's Nursery*, 177 F.3d at 454 n.4 (quoting from EEOC's argument that "federal law prohibits the enforcement of arbitration

[20] EEOC attempts in its Policy to distinguish *Gilmer* by claiming the agreement at issue was not part of an "employment contract." This Court's decision in *Circuit City* has rendered that distinction meaningless, holding most employment contracts, like the securities exchange agreement in *Gilmer*, are covered by the FAA. *See Circuit City*, 121 S. Ct. at 249. Yet, EEOC's Policy apparently remains in force; it is published on the agency's website as of this writing and, to Waffle House's knowledge, has not been withdrawn or modified. *See Policy* (visited July 1, 2001) <http://www.eeoc.gov/docs/mandarb.html>.

agreements that require an individual, in this statutory context, to agree prospectively to submit any future claim to arbitration as a condition of initial or continued employment"); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) ("The EEOC as *amicus curiae* contends that employees cannot agree to arbitrate Title VII claims in predispute agreements."; rejecting that view).

EEOC's arguments in the instant case, like its Policy, reveal its position that enforcement of mandatory agreements to arbitrate discrimination claims is contrary to its mission, notwithstanding the courts' nearly unanimous rejection of that view. *See Gilmer*, 500 U.S. at 30 (explaining that generalized attacks on arbitration 'rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and, as such, 'they are far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes' (quoting *Rodriguez de Quijas*, 490 U.S. at 481) (citation and internal quotation omitted)). This Court should view EEOC's arguments in favor of reversal in that light. [21]

[21] While EEOC concedes merely for the sake of argument the validity of the arbitration agreement in the instant case (Pet. Brf. at 10); *see supra* n. 3, some of its *amici* not only challenge the arbitration agreement as unenforceable, but also strenuously argue against arbitration of discrimination claims under any circumstances. *See* Brief *Amicus Curiae* of Lawyers' Committee for Civil Rights Under Law, *et al.*, at 15-20; Brief of The National Employment Lawyers Association, *et al.*, at 16-20; Brief of the States of Missouri, *et al.*, at 10-25.

CONCLUSION

Respondent Waffle House respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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